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IN THE SUPREME COURT OF THE UNITED STATES

JUNE TERM, 1991

KATHLEEN ANN STEWART,
Petitioner,

v.

FORT WAYNE COMMUNITY SCHOOLS,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

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QUESTIONS PRESENTED

Does the deprivation of a protected property interest by an administrative body result in a violation of substantive due process when the substantive standards on which the administrative body relies are based on a rescinded policy?

a. Does a schol psychometrist have a legitimate claim of entitlement to, and thus a constitutionally protected property interest in, her job when she has achieved "tenured" status under state law?

b. When a school board replaces a specific reduction-in-force policy (requiring dual-certification of administrative personnel) with a new policy (requiring a general review of qualifications), does the school board's subsequent use of the rescinded policy in discharging the petitioner fail the "reasonably ascertainable standards" test?

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INTRODUCTORY PRAYER

The Supreme Court of Indiana acknowledged that in 1983, Fort Wayne Community Schools (hereinafter "School") rescinded its 1981 retrenchment policy which favored psychometrists who were also certified as counselors. The Indiana Supreme Court rejected the petitioner's due process claim under Section 1983 of Title 42 despite the fact that the

petitioner, who had "tenure" status under state law, was later terminated pursuant to a written decision of the school board which set forth in length the rescinded policy and was explicitly based on the petitioner's lack of a counselor's certification. The Supreme Court of Indiana denied the petitioner's Petition for Rehearing on March 21, 1991. The petitioner, Kathleen Ann Stewart, prays that the Supreme Court of the United States grant a writ of certiorari to review the judgment of the court below.

CITATIONS TO OPINIONS BELOW

Stewart v. Fort Wayne Community Schools, 545 N.E.2d 7 (Ind. App. 1989).

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on December 27, 1990, reversing the decision of the Indiana Court of Appeals for the Third District and affirming the decision of the trial court and ultimately the school board's

decision to terminate the petitioner, Kathleen Ann Stewart (hereinafter, "Stewart"). The Supreme Court of Indiana denied a timely Petition for Rehearing on March 21, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES AND CONSTITUTIONAL PROVISIONS

1. United States Constitution, Amendment 14, Section 1: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

2. 42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

3. 42 U.S.C. § 1988: " . . . In any action or proceeding to enforce a provision of [42 U.S.C. § 1983] . . ., the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost."

STATEMENT OF THE CASE

Facts Material to Questions Presented.

On February 18, 1983, Stewart received notice that the school board would be considering the cancellation of her contract at a school board meeting on March 28, 1983 (R.30). The school board held a hearing at Stewart's request and, on March 28, 1983, terminated Stewart pursuant to its written Findings and Conclusions (R.30-37). The parties stipulated that Stewart had permanent or

"tenure" status under Indiana's teacher tenure statute (R.12).

It is clear from the board's findings that Stewart was terminated pursuant to the board's rescinded 1981 "dual certification" policy. On November 23, 1981, the school board had adopted a policy to reduce the number of administrative positions (R.34-35). At the core of the 1981 policy was the requirement of dual certification whereby psychometrists were required to have or obtain certification in the field of counseling in addition to psychometry (R.34-35).

During the school year 1981-82, after the implementation of the 1981 dual certification policy and prior to its rescission, Stewart notified the school of her desire to obtain a counselor's license (R.170) and she was actively pursuing the licensing requirements by taking

coursework required therefor. (R36 & 168). Although Stewart did not complete the licensing requirements, the dual certification requirement had been rescinded by the school board prior to Stewart's termination on March 28, 1983.

According to the minutes of a board meeting dated January 24, 1983, the board adopted new administrative reduction guidelines which were "to replace those adopted on November 23, 1981" (R.270). The new guidelines contain no dual certification requirement (R.270).

Nevertheless, in its written Findings and Conclusions, the school board specifically followed the 1981 dual certification policy as the rationale for Stewart's termination. The findings set forth the 1981 policy in length and Stewart's termination was explicitly based on her lack of additional certification (R.33-4, 37). The school board's Findings

and Conclusions are devoid of any reference to the new 1983 policy which required a fair and equitable review of the qualifications of the individual administrators (R.270).

The school board retained two non-tenured psychometrists despite the fact that neither had counselor certification. The dual certification policy permitted non-certified persons to "act" as psychometrist/counselor despite state regulations requiring proper certification. Although both of the retained, non-tenured psychometrists had teacher's certificates, that is only one requirement of counselor certification. One of the retained non-tenured psychometrists was only assigned psychometrist duties (i.e, testing).

How the Federal Question Was Presented.

Although Stewart's original complaint was not included in the transcript of the

record, the trial court's Findings of Fact show at paragraph 15 that "Plaintiff's complaint against Defendant (as alleged in her complaint) is that her constitutional rights were violated pursuant to 42 U.S.C. § 1983 and that the actions of the School Board were arbitrary and capricious" (R. 22). The trial court disagreed (R. 23) and Stewart appealed to the Court of Appeals for the Third District of Indiana arguing that the school board's decision was based on a rescinded policy and was, thus arbitrary and capricious (Brief, part VI of Argument) and that such action supported a claim under 42 U.S.C. Section 1983 (Brief, part VII of Argument). The Court of appeals agreed and held that "FWCS has deprived Stewart of a property interest secured by the due process clause of the Fourteenth Amendment. This deprivation entitles her to damages and equitable relief pursuant to Section 1983

and to attorneys fees under Section 1988" (Opinion, p. 11). In opposition to the School's Petition to Transfer to the Supreme Court of Indiana, Stewart again argued that "the school board and trial court based their decisions upon the rescinded policy of 1981" (Brief, p.5), thus rendering the decision arbitrary and triggering 42 U.S.C. § 1983 (Brief, p.8). The Supreme Court of Indiana passed upon the issue finding no due process deprivation.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Indiana closed its eyes both to Stewart's state law claims and to her claim of protection under the federal constitution. While Stewart has fully exhausted her state law claims, this case presents broad issues of great importance at the federal level; namely, the clarification of the scope of the due process clause of the Fourteenth

Amendment as it relates to administrative decision-making. This case also presents a compelling opportunity to prevent a manifest injustice to the petitioner, Kathleen Ann Stewart.

Since the school board acted under color of state law, Section 1983 of Title 42 gives Stewart a cause of action against the school board if the board's action deprived Stewart of "any rights, privileges, or immunities secured by the Constitution . . ." 42 U.S.C. § 1983 (1988). The school board's action in terminating Stewart's employment based on a rescinded policy violated Stewart's right to substantive due process under the 14th Amendment of the federal Constitution.

The due process clause of the 14th Amendment protects Stewart from the deprivation of a protected property interest for arbitrary reasons. Thus, the

initial question is whether Stewart had a property interest in her job that is protected by the 14th Amendment.

The Supreme Court of Indiana acknowledged that Stewart had the type of interest in her job which lies within the scope of the 14th Amendment's protection of "life, liberty, and property." This conclusion is compelled by this Court's decision in Board of Regents v. Roth, wherein the Supreme Court said:

> To have a property interest in a benefit [such as a job] a person clearly must have more than an abstract need or desire for it. He must have more than an unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Board of Regents v. Roth, 408 U.S. 564, 577, 33 L.Ed.2d 548, 561, 92 S. Ct. 2701 (1972). In Roth, this Court held that a state university teacher's interest in continued employment did not merit

constitutional protection where the teacher had no claim of entitlement under contract or state law. Id. However, this Court has held that even in the absence of a formal contract or formal tenure scheme, a protected property interest in a job may be created by an implied promise of continued employment (Connell v. Higginbotham, 403 U.S. 207, 208, 29 L.Ed.2d 418, 420, 421, 91 S.Ct. 1772 (1971)) or by a defacto tenure policy (Perry v. Sinderman, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972)).

In this case, the parties stipulated that Stewart had permanent or "tenure" status under the Indiana teacher tenure statute. Her expectation of and reliance upon continued employment was clearly more than abstract or unilateral. Rather, she had a legitimate claim of entitlement under state law. Therefore, the school board could not deprive Stewart of her job

in a manner inconsistent with the requirements of due process.

The most basic substantive requirement of due process is the prohibition against arbitrary decision-making. In order to promote fair, orderly, and consistent decision-making, governmental decisions which affect constitutionally protected interests of individuals are required to be in accord with previously stated, reasonably ascertainable standards. Holmes v. New York City Housing Authority, 398 F.2d 262 (2nd Cir. 1968); Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967).

In the present case, the findings of the school board go to great length to show the economic necessity of the reduction in force. There is no question that the School could reduce its administrative staff for economic reasons. However, in determining who should bear

the harsh consequences of the economic reality, the board had to base its decision on previously stated, reasonably ascertainable standards, where its decision would affect constitutionally protected interest. Implicit in the ascertainable standards requirement is the notion that the agency must follow the standards in effect and must not arbitrarily base its decision on a rescinded policy. It could hardly be more clear in the instant case that the board base its decision on the "dual certification" policy adopted in 1981 and rescinded in January of 1983.

Stewart had a right to assume that, in reaching its decision, the board would make a general evaluation of her qualifications rather than punish her for failing to meet the requirements of a rescinded policy. Indeed, this is one of the rationale for the "reasonably

ascertainable standards" requirement: so that the individual does not have to guess as to what the agency will consider in making its decision.

It is true that this Court has held that an agency's violation of its own regulations is not per se unconstitutional unless the regulations themselves are necessary to afford due process. United States v. Caceres, 440 U.S. 741, 59 L.Ed.2d 733, 99 S.Ct. 1465 (1979); see also, Arzanipour v. Immigration and Naturalization Service, 866 F.2d 743 (5th Cir. 1989); Bowens v. N. C. Department of Human Resources, 710 F.2d 1015, 1019 (4th Cir. 1983); and Woodard v. Las Fresnos Independent School District, 732 F.2d 1243, 1245 (5th Cir. 1984). However, all of the cases following this rule have dealt with an agency's failure to comply with its own procedural requirements. Where the agency failed to comply with its

own substantive standard, courts have found that the requirements of due process were not met. E.g., Marshall v. Lansing, 839 F.2d 933, 943 (3rd Cir. 1988). The requirement that agencies follow its own substantive standards goes to the core of the "reasonably ascertainable standards" test and the due process protection against arbitrariness. In the present case, the board had expressly replaced the dual certification policy of 1981 with a new policy which had no dual certification requirement. In reaching its decision, the board ignored its own substantive standard and relied instead upon the rescinded policy. The decision must therefore be characterized as arbitrary and Stewart is entitled to relief under Sections 1983 and 1988 of Title 42.

CONCLUSION

For all the foregoing reasons, the Supreme Court of the United States should

grant Stewart's Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Indiana.

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